STATE OF MICHIGAN

COURT OF APPEALS

DONNA SEUDEAL,

Plaintiff-Appellant/Cross-Appellee,

v

BAKER COLLEGE,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
April 30, 2002

No. 227323
Genesee Circuit Court
LC No. 99-065851-NZ

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's judgment granting defendant's motion for summary disposition. Defendant cross-appeals the trial court's conditional grant of plaintiff's motion for relief from judgment. Plaintiff chose not to fulfill the conditions, effectively reinstating the court's previous summary disposition decision in favor of defendant under MCR 2.116(C)(10). We reverse the judgment granting defendant's motion for summary disposition.

This case arises out of plaintiff's enrollment in defendant's physical therapist assistant program, and plaintiff's subsequent removal from the program by defendant. Plaintiff asserted that she was removed from the program for discriminatory reasons and that defendant breached a contract regarding the taking of a test. Defendant maintained that plaintiff was removed from the program because she failed the program twice and did not meet the requirements for reentry into the program.

The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) based on plaintiff's deposition testimony. In the deposition, plaintiff was unable to recall certain incidents or facts supporting her position. Plaintiff subsequently filed, through a new attorney, a motion for relief from judgment pursuant to MCR 2.612(C)(1)(a),(b), and (f).

The trial court granted the motion on the condition that plaintiff reimburse defendant for attorney fees and costs associated with responding to plaintiff's motion for relief from judgment, and additionally, fees and costs incurred by defendant in conducting discovery relating to matters raised in plaintiff's motion for relief.[1] In the motion for relief from judgment, plaintiff argued

[1] The trial court entered two conditional orders granting the motion for relief from judgment, the second of which controlled, and which modified the amount to be paid to defendant to cover
(continued…)

that she struggled with the deposition because of the language barrier and should be allowed to present an affidavit clarifying and explaining her deposition answers, which were not definitive but merely showed lack of recall. Plaintiff also argued that previous counsel failed to timely file several affidavits which would have created an issue of fact, and that lab books of other students existed that would have supported plaintiff's claims, but defendant had refused to produce the books. The trial court's order granting the motion was based on the court's perception that plaintiff's original counsel poorly represented plaintiff, and the court decided to allow plaintiff the opportunity to gather more documentary evidence, while at the same time allowing defendant to submit a later motion for summary disposition if appropriate. The trial court did not find that an issue of fact existed.

Plaintiff refused to pay the attorney fees and costs required in the conditional order granting the motion for relief from judgment, which, in effect, resulted in the reinstatement of the judgment granting defendant's motion for summary disposition. On appeal, a review of the questions presented by plaintiff in her brief does not reflect an argument that the trial court erred in placing the conditions on the order granting the motion for relief from judgment, nor is there a question presented relating in any manner to the conditional order or the motion for relief from judgment.[2] Ordinarily, no point will be considered that is not set forth in the statement of questions presented. *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000). Therefore, because the conditional order expired without compliance below and without challenge on this appeal, there is simply nothing for us to review as to plaintiff's motion for relief from judgment. Accordingly, we are left to address only the trial court's judgment granting defendant's motion for summary disposition.[3] Moreover, we are thus confined to reviewing only the evidence presented to the trial court at the motion for summary disposition, and not additional evidence presented at the hearing on the motion for relief from judgment, which has become a nullity. Additionally, in the context of determining whether the trial court properly granted summary disposition, it would be improper to consider the evidence presented in the subsequent motion for relief from judgment because defendant never had the opportunity to conduct discovery related to that evidence as envisioned by the trial court in the conditional order, which order is not challenged by plaintiff.

This Court reviews decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests whether there is factual support for a claim and is reviewed to determine whether the affidavits, pleadings, depositions, or any other documentary evidence establish a genuine issue of material fact to warrant a trial. *Id.* This Court will give the nonmoving party

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costs and attorney fees and limited the discovery costs.

[2] Plaintiff states in her brief that "[t]he order granting summary [disposition] was the last effective order of the trial court[.]" Plaintiff also notes that "[g]iven that the conditions required to effectuate reversal were never fulfilled, the order granting Baker College summary judgment has never been reversed and presently remains in effect."

[3] Therefore, it is unnecessary to decide defendant's cross-appeal challenging the conditional order granting relief from judgment.

the benefit of all reasonable inferences when determining whether summary disposition is appropriate. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995).

Plaintiff contends that the trial court on summary disposition should have allowed her unclear deposition to be explained in her favor by a subsequent affidavit. However, the record shows that the affidavit plaintiff refers to was not made until after the summary disposition motion was filed, answered, and heard. Only those documents submitted by the parties at the time of the motion were reviewable by the trial court, and the same is true here for the reasons stated above. MCR 2.116(G)(5); *Spiek, supra* at 337. Thus, the affidavit is not germane to this issue.

However, we find that that the deposition was sufficiently unclear and confused under the law to preclude it from binding plaintiff to an admission that she had no cause of action. *Hazelton v Lustig*, 164 Mich App 164, 168-169; 416 NW2d 373 (1987). Plaintiff's deposition testimony, in response to questions concerning what exactly constituted discrimination and breach of contract, shows that she repeatedly did not answer questions, or answered "I'm not sure," "I can't/don't recall," and "I can't/don't remember." Plaintiff cannot be bound to these answers because they are unclear and equivocal. *Henderson v Sprout Brothers, Inc*, 176 Mich App 661, 670; 440 NW2d 629 (1989). Her statements were not assertions of any kind – they merely related an absence of information and that at the time of the deposition, plaintiff was simply unsure of the facts. *Hazelton*, *supra* at 168-169. Therefore, the trial court erred in characterizing the deposition as an admission of no cause of action.

Although plaintiff's deposition testimony did not constitute an admission of no cause of action, it did lend support to defendant's position that summary disposition was appropriate because there was no genuine issue of fact. Therefore, plaintiff was required to come forward with sufficient evidence to create an issue of fact as to whether a claim for discrimination and breach of contract existed.[4] MCR 2.116(G)(4).

We find that plaintiff presented minimally sufficient evidence to create an issue of fact as to both of plaintiff's claims. Considering the entirety of plaintiff's deposition testimony, including plaintiff's responses to her counsel's questions which touched on the allegedly breached contract and discrimination, and the numerous school and postal documents submitted to the trial court,[5] we conclude that issues of fact existed as to whether defendant's employees

[4] To rule otherwise would allow a party to feign lack of recall at a deposition without requiring that party to submit evidence to create an issue of fact for purposes of MCR 2.116(C)(10).

[5] Particularly interesting is a statement from the Dean of the Health and Human Services Department at Baker College attached to the complaint, which provided that in his opinion, "the sequence of events surrounding a 10/7/97 laboratory check-off did not provide the student [plaintiff] with equitable treatment." Additionally, the school and postal documents could be interpreted as suggesting that defendant decided to remove plaintiff from the program before the results of plaintiff's reexamination had even been received. Based on our determination that the documents attached to plaintiff's answer to defendant's motion for summary disposition were sufficient to create a question of fact, we find it unnecessary to address whether plaintiff's verified complaint should be considered in determining whether a genuine issue of fact existed.

discriminated against plaintiff and breached a contract in removing plaintiff from the program. This case is very factually driven with an overabundance of facts, and it is appropriate for the trier of facts to resolve the dispute.

Plaintiff next contends that the trial court erred because plaintiff's substituted trial counsel, suffering from unpredictable and severe headaches, was not allowed to withdraw following the motion for relief from judgment. The lower court record indicates that the trial court never denied a request to withdraw, but simply told counsel to file a motion to withdraw, which apparently never occurred. Therefore, the issue is not properly before us, and counsel is free to move for withdrawal on remand.

Finally, plaintiff contends that the trial judge was predisposed against plaintiff, compelling remand of this case to a different trial judge. As plaintiff admits, there was not a motion for disqualification properly raised in the court below. MCR 2.003; *In re Schmeltzer*, 175 Mich App 666, 673; 438 NW2d 866 (1989). However, absent a lower court ruling on the disqualification issue, we may choose to remand a case to a different lower court judge if the record indicates that the original judge would have difficulty putting previously expressed views or findings out of his or her mind. *Feaheny v Caldwell*, 175 Mich App 291, 309-310; 437 NW2d 358 (1989).

Ordinarily, a showing of actual, personal prejudice is required to disqualify a judge under the court rule, and the party raising the issue has a heavy burden of overcoming a presumption of impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497, 512-513; 548 NW2d 210 (1996). That a judge repeatedly rules against a litigant, even if the rulings are erroneous, does not establish disqualification based on bias or prejudice. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Critical or hostile remarks made by a trial judge to counsel or the parties during trial does not usually establish disqualifying bias either. *Cain, supra* at 497 n 30.

A review of the transcripts and orders generated in this case does not reveal any personal prejudice or bias on the part of the trial court, or any other reason to remand to a different trial judge. The trial court made only slightly negative comments toward plaintiff and counsel, and in fact, the most negative comments made were directed at both attorneys. The merely unfavorable rulings against plaintiff are likewise insufficient for disqualification. Thus, we find no reason to remand this case to a different trial judge.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald